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BEFORE THE ARIZONA CORPORATION COMMISSION

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In the matter of the petition)
by Autotel for arbitration of)
an interconnection agreement)
with Qwest pursuant to)
Section 252(b) of the)
Telecommunications Act)

AZ CORP COMMISSION
DOCUMENT CONTROL

Docket No. T-01051B-05-0858

REPLY BRIEF IN RESPONSE TO QWEST'S MOTION TO DISMISS

A. Background

On November 23, 2005, Autotel filed with this Commission a Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act. On December 13, 2005, Qwest Corporation (Qwest) filed a Response to the Petition for Arbitration, including a Motion to Dismiss the Petition. Qwest contends that the Petition for Arbitration is inappropriate and that Autotel has violated Section 252(b)(2)(A) in submitting the Petition.

B. Discussion

Reply to Staff

Staff's argument that the parties are bound by the earlier arbitration decision is not relevant. The renegotiation provision at Section XXII.B.1 of the approved agreement was negotiated by the parties and was not an open issue previously decided by this Commission.

Staff next argues Autotel is attempting to litigate simultaneously the same issues in two forums while at the same time saying the Petition should be dismissed because Autotel has not set forth any real issues. Such a confusing argument is difficult to respond to. However it is the Petitioner and the Respondent, not the Staff or the Arbitrator, that determine the open issue(s) they want the State commission to decide. Qwest had objected to open issues 2 and 3. Now that Autotel has withdrawn those two open issues, one open issue remains.

Reply to Qwest

The Petition is the result of Qwest's refusal to negotiate a replacement interconnection agreement. Section 252 give this Commission jurisdiction to conduct arbitration proceedings. No court has enjoined Autotel from exercising its rights under the Telecommunications Act. No court has taken away this Commission's jurisdiction to conduct arbitration proceedings nor has Autotel asked a court to take such action.

The renegotiation provision in the party's existing agreement provides "The Parties agree to commence negotiations on a new agreement no later than 2 ½ years after this agreement becomes effective." Qwest contends this provision should be read to say that negotiations should not begin before 2 ½ years. In the Qwest proposed agreement, Qwest's revised renegotiation provision states "Any Party may request negotiation of a successor agreement by written notice to the other Party no earlier than one hundred sixty (160) Days prior to the expiration of the term, or this Agreement shall renew on a month to month basis." It is clear that Qwest understands the difference between "no later than" and "no earlier than". This Commission can not retroactively impose Qwest's

proposed renegotiation provision in the existing approved interconnection agreement.

Conclusion

Resolution of the remaining open issue is not so difficult that a recommended arbitration decision could not be rendered prior to the Commission's scheduled mid March open meeting. On the other hand there are some good reasons for this Commission to consider dismissing the Petition. Attached is a copy of an Order of Dismissal from the Virginia Commission which gives some. There are some not so good reasons to dismiss a petition. Qwest has furnished some examples of those.

Respectfully Submitted, this 27th day of January, 2006,



Richard L. Oberdorfer
Autotel
114 NE Penn Avenue
Bend, Oregon 97701
(541) 389-5286 voice
(541) 389-9856 fax
oberdorfer@earthlink.net

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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, OCTOBER 11, 2002

PETITION OF

CAVALIER TELEPHONE, LLC

CASE NO. PUC-2002-00171

For Arbitration Pursuant to
§ 252(b) of the Telecommunications
Act of 1996 to Establish an
Interconnection Agreement with
Verizon Virginia Inc.

ORDER OF DISMISSAL

On August 14, 2002, Cavalier Telephone, LLC ("Cavalier"), filed with the State Corporation Commission ("Commission") a Petition for arbitration of unresolved issues in its interconnection negotiations ("Arbitration Petition") with Verizon Virginia Inc. ("Verizon Virginia") pursuant to § 252(b) of the Telecommunications Act of 1996¹ and § 5-419-10 et seq. of Title 20 of the Virginia Administrative Code. Cavalier requests that the Commission resolve its dispute with Verizon Virginia by: (i) resolving the disputed issues; (ii) affirmatively ordering the parties to submit an interconnection agreement for approval by the Commission in accordance with § 252(e) of the Act; and (iii) retaining jurisdiction until Verizon Virginia has complied with all implementation time frames specified in the

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 et seq. ("Act").

arbitrated interconnection agreement and has fully implemented the terms of this agreement.

On September 9, 2002, Verizon Virginia filed its Response, with exhibits, to the Arbitration Petition of Cavalier. Verizon Virginia responded to the nineteen arbitration issues identified by Cavalier and raised six supplemental issues.

On October 4, 2002, Cavalier filed a Response to New Issues Raised by Verizon Virginia, which addressed each of the six supplemental issues raised by Verizon Virginia.

Cavalier brings its Arbitration Petition pursuant to 47 U.S.C. §§ 251 and 252 and the effective rules implementing these provisions of the Act, issued by the Federal Communications Commission ("FCC") in its Local Competition Order.² Cavalier also relies upon this Commission's Procedural Rules for Implementing §§ 251 and 252 of the Act (20 VAC 5-419-10 et seq.). While 20 VAC 5-400-180 F 6 provides for our "arbitration" of contested interconnection matters,³ Cavalier submits its Arbitration Petition for consideration according to

² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) hereinafter the "Local Competition Order."

³ As discussed in our Order of June 15, 2000, in Case No. PUC-1999-00101, Petition of Cavalier Telephone, LLC, for arbitration of interconnection rates, terms, and conditions, and related relief, the Commission has authority under state law to order interconnection between carriers operating within the Commonwealth, and § 56-38 of the Code of Virginia authorizes us, upon request of the parties, "to effect, by mediation, the adjustment of claims, and the settlement of controversies, between public service companies, and their employees and patrons."

the Act and not simply under state law. Cavalier recognizes in its Arbitration Petition that the Commission may choose to decline to exercise jurisdiction over this matter and instead refer it to the FCC. Cavalier states that it does not oppose such consideration of the Arbitration Petition by the FCC.

The Commission has declined to waive sovereign immunity under the Eleventh Amendment to the Constitution of the United States. We have avoided waiver of our immunity and explained our reasons in the Commission's Order of Dismissal of the Application of AT&T Communications of Virginia, Inc., et al., For Arbitration with Verizon Virginia, Case No. PUC-2000-00282, issued December 20, 2000 ("AT&T Dismissal Order").⁴ We repeat below our holding in the AT&T Dismissal Order in which we declined to exercise jurisdiction.

As stated in our November 22, 2000, Order, until the issue of the Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States, we will not act solely under the Act's federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity, including the arbitration of rates, terms, and conditions of interconnection agreements between local exchange carriers. (AT&T Dismissal Order, p. 2.)

In Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. ___, 70 USLW 4432 (2002) ("Verizon Md. v. PSC of Md."), the

⁴ On July 17, 2002, the FCC released the first of two orders (its non-pricing order) on AT&T's Arbitration Petition. See Memorandum Opinion and Order by the Chief, Wireline Competition Bureau, CC Docket No. 00-251.

Supreme Court held that the federal courts have jurisdiction under 28 USC § 1331 to review state commission orders for compliance with the Act or with an FCC ruling issued thereunder⁵ and that suit against individual members of the state commission may proceed under the doctrine of Ex Parte Young, 209 U.S. 123 (1908). However, Verizon Md. v. PSC of Md. did not disclose whether state commissions waive their sovereign immunity by participating in § 252 matters nor whether Congress effectively divested the states of their Eleventh Amendment immunity from suit under § 252 of the Act.⁶

⁵ While Verizon Md. v. PSC of Md. was decided on the state commission's enforcement of an interconnection agreement, this decision may suggest federal court jurisdiction under 28 USC § 1331 also applies to a state commission's arbitration of an interconnection agreement as well. The Supreme Court noted in bypassing a determination of whether § 252(e)(6) applied to enforcement actions:

...none of the other provisions of the Act evince any intent to preclude federal review of a commission determination. If anything, they reinforce the conclusion that § 252(e)(6)'s silence on the subject leaves the jurisdictional grant of § 1331 untouched. Section 252(e)(4) provides: "No State court shall have jurisdiction to review the action of a state commission in approving or rejecting an agreement under this section." In sum, nothing in the Act displays any intent to withdraw federal jurisdiction under § 1331; we will not presume that the statute means what it neither says nor fairly implies (footnote omitted).

Verizon Md. v. PSC of Md., 70 USLW 4432 at 4435.

⁶ "Whether the Commission waived its immunity is another question we need not decide, because - as the same parties also argue - even absent waiver, Verizon may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of Ex Parte Young, 209 U.S. 123 (1908)." Verizon Md. v. PSC of Md., 122 S.Ct. 1753, 70 USLW 4432 at 4435.

The Commission finds that the Arbitration Petition of Cavalier should be dismissed so that the parties may proceed before the FCC. It shall be the responsibility of the parties to serve copies of all pleadings filed herein on the FCC.

Accordingly, IT IS ORDERED THAT:

(1) This case is hereby dismissed without prejudice, consistent with the findings above. This Commission will not arbitrate the interconnection issues for the reasons set forth in the findings above.

(2) There being nothing further to come before the Commission, this case is dismissed.

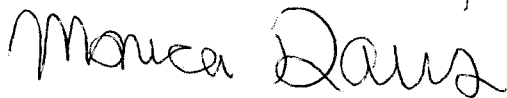
CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of Autotel's reply brief in response to Qwest's Motion to Dismiss, was sent via Federal Express overnight service on January 26, 2006.

Gregory B Monson
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84111

Timothy Berg
Theresa Dwyer
Fennemore Craig, P.C.
3003 N Central Ave. Suite 2600
Phoenix, Arizona 85012

Norman G. Cutright
Corporate Counsel
QWEST Corporation
4041 N Central Ave. Suite 1100
Phoenix, Arizona 85012

A handwritten signature in black ink that reads "Monica Davis". The signature is written in a cursive, flowing style.

Monica Davis
Office Assistant